

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

MONTEREY MUSHROOMS, INC.

Madisonville, Texas

Employer

and

Case 16-RC-10733

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 408**

Petitioner

DECISION AND ORDER

United Food and Commercial Workers Union, Local 408, hereinafter referred to as Petitioner, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent the following employee classifications at the Employer's facility in Madisonville, Texas: all piece-rate mushroom pickers excluding all other employees including guards and supervisors as defined in the National Labor Relations Act, as amended. There are approximately 210 employees in the piece-rate mushroom pickers classification that Petitioner seeks to represent. There is no local bargaining history by the parties regarding the petitioned-for employees. A hearing officer of the Board held a hearing and the Employer filed a brief with me.

I. ISSUE

The issue presented in this case is whether the piece-rate mushroom pickers are agricultural laborers as defined in Section 2(3) the Act. Petitioner asserts that these workers are not agricultural laborers. Conversely, the Employer contends that these workers are agricultural laborers and, therefore, are outside the jurisdiction of the Act. The Employer does not object to

the appropriate unit as described above if it is determined that they are not agricultural laborers. Thus, the issue is whether these workers are agricultural laborers as defined in the Act. If these workers are agricultural laborers, they will be excluded by operation of the Act.

For the reasons set forth below, I find the petitioned-for workers are agricultural laborers as defined in the Act and are outside the Board's jurisdiction. To lend context to my discussion of the issue, I will provide an overview of the Employer's operations and historical background to the extent necessary for my discussion of the issues, followed by a statement of material facts and legal analysis.

II. OVERVIEW OF EMPLOYER'S OPERATIONS and HISTORICAL BACKGROUND

Employer operates a farm in Madisonville, Texas where it produces mushrooms and prepares for distribution of mushroom products. Approximately 600 employees work at the farm.

The top of the organizational structure at the farm includes a general manager (GM) who has oversight over the entire operation. David Nesselrode, who has been employed by the Employer for 18 years, has been serving as GM for the past 13 months. Reporting directly to Nesselrode are the controller, harvesting manager, process manager, growing manager (which is currently a vacant position), engineering manager and human resource manager. The employees in issue (i.e., piece-rate mushroom pickers) work under the direction of the harvesting manager, a position currently held by Enrique Herrera.

Evidence presented at the hearing reveals there have been two attempts by labor organizations to represent workers performing the same kind of work involved herein. One involved the Employer's Loudon, Tennessee facility. In 1986 the Oil, Chemical & Atomic Workers International Union filed a petition seeking to represent workers engaged in the

growing, picking, sorting, grading, packing and transporting of mushrooms. As a result of an administrative investigation, the Regional Director for Region 10 dismissed the petition (Case No. 10-RC-13344) based on the conclusion that the workers engaged in these activities were agricultural laborers excluded from coverage under the Act.

Similarly, in 1976 the Amalgamated Meat Cutters District Local 408 filed a petition in this region (Case No. 16-RC-7132) involving the prior owner of this facility, Ralston Purina Company. As a result of an administrative investigation, the Acting Regional Director determined that these workers were “agricultural workers” within the meaning of Section 2(3) of the Act and could not be included in a unit found appropriate by the Board because the petitioned-for workers were primarily engaged in the growing and cultivation of mushrooms.

During the instant hearing, no evidence was presented that the farm’s operations have changed since the date of this earlier petition.

III. FACTS

As referenced above, the Employer employs approximately 210 employees in the piece-rate mushroom picker classification. The job of a mushroom picker is to harvest or “pick” the mushrooms from the growing trays. Other workers are employed as luggers, who will be discussed further below, who support the mushroom pickers by collecting the harvested mushrooms.

At the Employer’s farm, mushrooms are grown in wooden four foot by six foot boxes called “trays” and are harvested in picking rooms. There are 45 picking rooms at the farm. Each room contains 360 trays that are organized as follows. There are 15 rows in each room. Each row consists of four stacks of six trays that are stacked on top of each other. A mushroom picker is assigned to a row and is responsible for climbing up and down each stack of trays, harvesting

each tray by hand. The harvesting is performed by manually twisting and pulling the mushroom off the casing layer, trimming the stump with a knife and putting the mushroom in individual containers depending on the size and quality of the mushroom.

Harvesting of mushrooms is a seven day a week function. Work begins at 7 a.m. and ends when all mushrooms ready for picking that day are harvested, but no later than 7 p.m. Most days the harvesting function ends around 3:00 p.m. to 4:00 p.m.

Mushroom pickers are organized in crews. The Employer maintains seven crews of mushroom pickers with 30 employees in each crew. On any given day there are five crews to perform the harvesting function. Mushroom pickers on a crew receive two days off per calendar week. Compensation for mushroom pickers is based on incentive, i.e., their compensation is determined by how many pounds of mushrooms they pick. They are also compensated for time spent attending safety meetings, but not for sanitation chores such as putting on hair nets or time spent sharpening their knives. Mushroom pickers punch a time clock solely to determine when they start and stop working. They have scheduled breaks and a lunch period. They do not receive overtime pay because they are considered exempt workers based on the agriculture exception under the Fair Labor Standards Act. Witness testimony reveals that during the 18 year period of Nesselrode's employment at the farm, the Department of Labor has never challenged the Employer's application of the agriculture exemption to these workers.

The mushroom pickers harvest three varieties of mushrooms. The majority of mushrooms are white button mushrooms. The other two kinds harvested are brown mushrooms and oyster or pleurotus mushrooms.

Luggers are support personnel for the mushroom pickers. The lugger removes the harvested mushrooms from the containers in the rows that the mushroom pickers have picked.

They take the mushrooms out of the room and consolidate them on carts for transportation down the hallway for further processing. Luggers then return the empty containers to the mushroom pickers so that the containers can be refilled. It is the lugger's responsibility to track how many units are being picked by and turned in by a mushroom picker. They also remove all trash of stumps that pickers produce during the day and are paid on an hourly basis. On rare occasions when there is a need to have additional luggers, volunteers from the ranks of mushroom pickers are sought to assist with the lugger function. When a mushroom picker performs lugger tasks, they are required to clock in and out, as luggers do, to reflect the time spent performing lugger work and are compensated based on the luggers' hourly wage rate. The record reflects that during the four week period ending July 22, 2006, mushroom pickers worked 31,363.75 hours picking mushrooms and only 742.58 hours performing lugger tasks. Thus, they performed lugger tasks less than three percent of the time considered on the record.

IV. ANALYSIS

Section 2(3) of the Act defines the term "employee." The same section provides that the term "employee" does not include any individual employed as an agricultural laborer. Thus, determining employee status is necessary to decide whether the Board has jurisdiction. Since 1946, Congress has added a rider to the Board's appropriation bill which provides that the term "agricultural laborers" shall be defined in accordance with Section 3(f) of the Fair Labor Standards Act which provides:

"Agriculture" includes farming in all its branches...and any practices...performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. 29 U.S.C. Sec. 203.

The Supreme Court has found that agriculture has both a primary and a secondary meaning. The primary meaning refers to actual farming operations, such as the cultivation,

tilling, growing, and harvesting of agricultural commodities. Harvesting is identified as the last step of the primary activities and ends when the produce is severed from the ground or plant and reduced to possession. (29 CFR Sec. 780.110, 117, 118) The secondary meaning includes activities performed by a farmer or on a farm in conjunction with such farming operations. **Farmers Reservoir & Irrigation Co. v. McComb**, 337 U.S. 755 (1949).

The burden of proving individuals are exempt as agricultural laborers rests on the party asserting the exemption. **Agrigeneral L.P.**, 325 NLRB 972 (1998). Applying the legal standard to the record evidence leads to the conclusion that the Employer has met its burden and established that mushroom pickers are agricultural laborers within the meaning of the Act. As such, they are not employees within the meaning of Section 2(3) of the Act.

The facts summarized above readily establish that the Employer's mushroom pickers are engaged in the harvesting of an agricultural commodity - mushrooms. Because mushrooms are an agricultural commodity, their production, cultivation, growing and harvesting fall within the exemption. Mushroom pickers manually twist and pull the mushroom from the planting trays and place them in containers. The containers are gathered and emptied by luggers who collect the harvested mushrooms for further processing.

These facts are similar to those considered by the Board in **Michigan Mushroom Company**, 90 NLRB 774 (1950). There, a union sought to represent the production and maintenance employees of an employer who operated a mushroom farm, similar to the instant matter. The Board found that the employer's workers, which included individuals who hand-picked mushrooms, were agricultural laborers and excluded them from coverage of the Act. Here, as in **Michigan Mushroom**, the mushroom pickers perform the harvesting of mushrooms, a function within the primary meaning of agriculture. As such, they fall within the exemption of

agricultural laborer as defined by Section 2(3) of the Act. Accordingly, making an appropriate unit determination for mushroom pickers is not appropriate under these circumstances.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The parties stipulated, and I find, the Employer, Monterey Mushrooms, Inc. is a California corporation engaged in the production and distribution of mushroom products. During the last twelve months, a representative period, the Employer in the course and conduct of its business operations, purchased and received at its Madisonville, Texas operation goods and materials valued in excess of \$50,000 from points outside the State of Texas. Based on the foregoing, I find the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and hereby is, **dismissed**.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001.

This request must be received by the Board in Washington by 5:00 p.m., EST on **August 17, 2006**. The request may **not** be filed by facsimile.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party wishes to file one of these documents electronically, please refer to the attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance may also be found under "E-Gov" on the National Labor Relations Board web site: www.nlr.gov.

DATED: August 3, 2006 at Fort Worth, Texas.

/s/ Martha Kinard
Martha Kinard, Regional Director
National Labor Relations Board
Region 16
819 Taylor Street, Room 8A24
Fort Worth, Texas